

March 24, 1994

P.S. Protest No. 93-29

TIMEKEEPING SYSTEMS, INC.

Solicitation No. 102590-93-A-0135

DIGEST

Request for reconsideration is granted to the extent that protester has demonstrated failure to consider fully information previously provided, and is otherwise denied.

ON RECONSIDERATION

TimeKeeping Systems, Inc., (TKS) requests reconsideration of three aspects of the decision of February 15, 1994, which denied TKS's protest against the terms of solicitation 102590-93-A-0135 for data collection devices and data transfer stations.

TKS's request for reconsideration raises three different points. First, TKS notes that the decision concluded that the data collection devices apparently could be procured by the use of a product description, rather than a specification, and takes exception to the decision's failure to mandate the use of a product description. The decision "decline[d] to direct the use of . . . a [product] description because it appear[ed] unlikely that its use would enhance competition." TKS contends that "it is not within the . . . General Counsel's discretion to override the requirements of the Procurement Manual. . . . [T]he decision must confirm the requirement . . . that a product description must be used. Enhanced competition is not a criterion for decision in this instance."

Second, TKS contends that the decision did not focus adequately on a portion of the record concerning the need of the data collection device to be compatible with the Dallas Semiconductor software programs RD_ROM, RD_RAM, RD_CLOCK, WR_RAM and WR_CLOCK (the "Touch Memory utilities"). The decision cited the standard (*prima facie* support) which the contracting officer must establish for the requirements of a specification, and indicated that once that support is established, the burden shifts to the protester to show that the requirement is clearly unreasonable, concluding that TKS had not met that burden.

The protester had contended that the utilities are not intended to communicate with a data collection device, and that their use to evaluate the compatibility of data collection devices was inappropriate and restrictive of competition. The decision summarized TKS's comments as characterizing the contracting officer's statement as acknowledging "that the Touch Memory utilities are not used to communicate with the data collection device, but with the Touch Memory device." TKS contends that the decision did not give enough weight to that statement, which TKS states was the contracting officer's admission that the requirement for compatibility with the Touch Memory utilities is unreasonable.

TKS also objects to the decision's failure to refer to a letter from Dallas Semiconductor to TKS which it characterizes as "stating that these software utilities should not be used to evaluate the data collection device,"¹ and to consider a letter from Dallas Semiconductor to the contracting officer which it asserts makes the same point.

TKS's third point with respect to reconsideration takes issue with the standard stated in the decision for overturning the decisions of technical personnel, that is, that "[t]his office will not substitute its judgment for that of the technical personnel absent 'fraud, prejudice, or arbitrary and capricious action.'" TKS contends, without citation, that this position "has no basis in law," contending that "the General Counsel [must] become sufficiently familiar with the technical issues at hand to render a technically competent decision."

The contracting officer submitted comments on the request for reconsideration which make the following points:

-- TKS's assertions regarding the use of a product description restates the points made in its protest. "Since the [Statement of Work] included a detailed description of the product being solicited, TKS's argument is . . . merely a complaint about the caption of that section of the solicitation and is without substantive significance." In any event, the requirements of the Procurement Manual (PM) regarding solicitation formats are "plainly for the benefit of the Postal Service" and protesters cannot complain about deviations from them. The contracting officer cites *De Matteo Construction Co. v. United States*, 600 F.2d 1384, 1392 (Ct. Cl., 1979) and *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129 (1940).

-- TKS has misstated the contracting officer's position with respect to the Touch Memory utilities. The contracting officer's statement was as follows:

¹ The relevant portion of the Dallas Semiconductor letter reads as follows:

The program NEWPC was written specifically for use with the Touch Pen described in Application Note 30. Other programs such as RD_RAM, WR_RAM, RD_ROM, RD_CLOCK, and WR_CLOCK which are found in the DS9092K Touch Memory Starter Kit do not take into account that the DS2404 [chip] used in the Touch Pen is operating in a dual port mode and may not work properly. Programs SETTIME and READTIME which come in the DS9099K Touch Pen Starter Kit were written with this dual port mode in mind and can be used for programming the DS2404 in the Touch Pen. The DS9092K programs, in any case, can be used to program and read standalone touch memories which could be used in conjunction with a Touch Pen.

The reason that . . . utilities were included, as specified as the Dallas Semiconductor standard, was to ensure compatibility of the devices with the protocol and the application program. These applications are used for communicating to the [T]ouch [M]emory buttons and not the data collection device.

"[T]he software utilities were included in the specification to ensure compatibility of the data collection devices with the protocol and the USPS developed application software. If this requirement was not included in the solicitation, the USPS could encounter compatibility problems between the programmed touch memory buttons and the data collection device."

-- The contracting officer received no letter from Dallas Semiconductor on the Touch Memory utilities issue, but Dallas Semiconductor did communicate with the program engineer on the subject. That October 14, 1993, letter offered comments on various parts of the solicitation "that might require further explanation, clarification, and perhaps modification of the wording in the solicitation." Dallas Semiconductor's specific comments on this point were as follows:

The SOW in Section 3.2 Data Collection Device Software/Firmware, page 7 states that the firmware will be compatible with NEWPCSA [and the Touch Memory utilities]. Of these programs, only NEWPCSA was specifically intended for use with the Touch Pen directly. The remaining programs can be used indirectly with the Touch Pen in the sense that they can be used with Touch Memories that are in turn read or written by the Touch Pen.

Dallas Semiconductor's statement "acknowledges an indirect relationship between the software utilities specified and the data collection devices. . . . To ensure that the [T]ouch [M]emory buttons were programmed in the same manner, the software utilities were specified in the solicitation."

-- The contracting officer strongly disagrees with TKS's position with respect to the standard of review appropriate to technical matters, noting that the protester's view would subject "every Postal Service purchase . . . to a mini-trial . . . on the technical aspects of the solicitation, since most purchases involve differences of opinion."

TKS has submitted comments on the contracting officer's response which make the following points:

-- The contracting officer's statement that protesters cannot complain about deviations from the direction for the use of product descriptions concedes that a deviation has occurred, but has not demonstrated that the deviation was approved as required by the Procurement Handbook.² The *De Matteo* decision which the contracting officer cites does not involve a contracting officer's failure to follow a procurement regulation.

² While the protester cites the Procurement Handbook, similar guidance (and the correct titles for the officials currently authorized to grant deviations) is found at PM 1.4.2.

-- With respect to the Touch Memory utilities issue, TKS restates the history of its inquiries on this matter in the course of the procurement (a history recited in the previous decision), stating that the responses which it received were inconsistent with the position now asserted that the relationship of the utilities to the data collection device was "indirect." TKS takes this to suggest that neither the contracting officer nor the requiring activity correctly understood the role of the utilities with respect to the data collection device.

-- The standard of review which TKS contemplates for the General Counsel would not involve "mini-trials" of the sort the contracting officer asserts, but would "prevent contracting personnel from coming up with any plausible sounding argument to support an incorrect, inappropriate or incompetent decision."

-- Additional information contained in the Dallas Semiconductor letter belatedly furnished by the contracting officer casts doubt on other positions previously taken by the contracting officer in the course of this protest. Specifically, Dallas Semiconductor's letter raises questions whether its NEWPC program is, as the contracting officer states, an "industry standard," since Dallas Semiconductor indicates that the program was written with specific applications in mind and that it may require modifications to take advantage of features of application programs which were not originated by Dallas.

DISCUSSION

We note initially that our review of requests for reconsideration is limited.

The standard for our review of reconsideration requests is very narrow. PM 4.5.7 n. states that a "request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered." Further, the controlling decision on this standard of review states:

Information not previously considered refers to that which a party believes may have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest. Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those we reached in that decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Similarly, where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration.

Federal Properties of R.I., Inc., On Reconsideration, P.S. Protest No. 93-02, July 9, 1993,

quoting *Fort Lincoln New Town Corporation, On Reconsideration*, P.S. Protest No. 83-53, November 21, 1983 (citations omitted).

We do not agree with the protester that having found that conditions existed under which the PM expresses a regulatory preference for the use of a purchase description, rather than a specification or statement of work, this office is required to implement that preference.³

Timeplex Federal Systems, Inc., and Sprint Communications Company, P.S. Protest Nos. 93-22; 93-24, February 2, 1994, recently noted that in resolving protests under the Competition in Contracting Act, the General Accounting Office will not, absent evidence of fraud or willful misconduct, consider a protester's contention that a specification should be given a more restrictive reading than that of the contracting agency, since its "role in resolving bid protests is to ensure that the statutory requirements for full and open competition have been met," citing *Container Products Corporation*, Comp. Gen. Dec. B-232953, 89-1 CPD 117, February 6, 1989. While PM 1.7.1 a., directing the principle of adequate competition to the Postal Service's practice of procurement, is regulatory, rather than statutory, we know of no reason why it should not be afforded similar consideration in our deliberations. Accordingly, as noted in our previous decision, since the use of purchase descriptions raises the possibility of less competition than the current solicitation provides, we decline to direct that use.⁴

The protester's second point deals with information not previously considered. The previous decision did not reference the letter from Dallas Semiconductor to TKS which TKS furnished as an attachment in its final submission on the protest. It is apparent that one thrust of that letter is that Dallas Semiconductor believes that it is inappropriate to require data collection devices to be able to run the Touch Memory utilities because the chip in the data collection device "may not work properly" with those utilities in the dual port mode. Its earlier comments to the requiring activity were to the same effect.⁵ It appears that the

³ We agree with the contracting officer that *De Matteo Construction Co. v. United States* teaches that the "[f]ailure of a government contracting agency to abide by a provision of its own [procurement] regulation is material only if the provision is for the benefit of the contractor and there is a causal nexus between the failure and the asserted financial injury to the contractor," but we reach our conclusion without adopting the contracting officer's suggestion that the direction that product descriptions be used, rather than specifications, is intended to benefit the Postal Service, not prospective contractors. (The continued vitality of the assertion in *Perkins v. Lukens Steel Co.* that "prospective bidders for contracts derive no enforceable rights against [a contracting agency] for an erroneous interpretation of [the legislation which enables it to contract]" to which the contracting officer adverts has been put into serious doubt by subsequent cases. See, e.g. *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir., 1970).)

⁴ The previous decision noted that the contracting officer had identified four brand-name products, other than the protester's product, which met the weight, durability, and temperature requirements of the solicitation, requiring modification only with respect to software compatibility issues. When there are at least three acceptable brand-name products, PM 2.3.2 c.3 allows the product description to be limited to those three products. It is difficult to understand the protester's insistence on the use of a product description in this case, since a possible consequence would be the elimination of its product from the competition.

⁵ While the protester faults the contracting officer for failing to provide that correspondence in the course of the protest, there is no evidence that she was aware of the correspondence, which was furnished to the requiring activity, not the contracting officer, prior to the request for reconsideration.

requiring activity failed to understand the significance of the Dallas Semiconductor comments of October 14 distinguishing between the direct application of NEWPCSA to the data collection device and the *indirect* relationship of the Touch Memory utilities to the device. That failure made the requirement for direct compatibility with the utilities clearly unreasonable. The desired compatibility of the device with the Touch Memory buttons can be accomplished without requiring the direct compatibility of the device with the Touch Memory utilities by revising the relevant paragraph of SOW 3.2 along the following lines:

All data written to the Touch Memory buttons will be in the format as specified in Appendix A of this SOW. The data collection device's firmware shall be compatible with Dallas Semiconductor's NEWPCSA, SETTIME and READTIME, and shall be compatible with Touch Memory buttons using Dallas Semiconductor's RD_ROM, RD_RAM, RD_CLOCK, WR_RAM and WR_CLOCK.

TKS's third point, its objection to the standard of our review of technical issues, is an attempt to reargue matters already raised, and thus is an inappropriate basis for reconsideration. *Fort Lincoln New Town Corporation, supra*.

Finally, in its comments following the contracting officer's submission, TKS seeks to raise additional matters based on the Dallas Semiconductor letter of October 14, information not previously available to it in the course of the protest. We have considered those additional matters, but they do not affect our previous conclusions.

Upon reconsideration, the previous decision is modified by directing the contracting officer to revise section 3.2 of the SOW along the lines set out above. In all other respects, the request for reconsideration is denied.

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